



**To: Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency
Office of Thrift Supervision**

**Federal Trade Commission
National Credit Union Administration**

From: California Market Data Cooperative, Inc. (CMDC)

**Re: Public Comment regarding Proposed Regulations regarding
Privacy of Consumer Financial Information, pursuant to
section 504 of the Gramm-Leach-Bliley Act (PL 106-102).**

California Market Data Cooperative, Inc. (CMDC) would like to thank the regulatory agencies for this opportunity to participate in the discussion concerning the proposed regulations regarding privacy of consumer financial information. Privacy is an issue that affects each of us from both sides. We are all consumers with certain expectations and anxieties about privacy. Yet we are also wealthy beneficiaries of the benefits of information sharing. We recognize the complexity and difficulty of your task and the energy and seriousness with which you have approached it. We hope that you find our comments helpful in the drafting of the final regulations.

Background

California Market Data Cooperative, Inc. (CMDC) is a non-profit cooperative formed in 1979 by the major savings and loans and banks in California in order to collect, compile and disseminate real estate appraisal information on behalf of its members. Its membership now includes not only thrift institutions and banks, but also mortgage bankers, real estate appraisers and other real estate professionals in California, Oregon, Nevada and

Texas. The information it collects is used to support reliable real estate appraisals and prevent fraud regarding the collateral used for mortgage loans.

As such, CMDC currently collects and compiles information parts of which might arguably fall under the purview of the provisions of the Gramm-Leach-Bliley Act ("GLB" or "the Act") and these proposed regulations.

Personal v. Collateral Information

In reading the regulations, it is clear that the focus of the discussion has been on what is commonly understood as personal information. That includes

- identifying information, especially that information which "unlocks" the access to information about the individual consumer, such as the social security number and different account numbers;**
- credit information especially about individual consumer's credit usage, history and other characteristics;**
- financial information such as income, assets, liabilities and "financial relationships" such as with whom the consumer has relationships and transactions**
- transactional information including such as credit and debit card transactions (with whom and for what amounts), checking account payments and credits (which one panelist at the FDIC public forum described as the "index to your whole life")**

It is within these categories of information that issues of privacy are not only the most sensitive, but where the reported abuses lie. The notion of "identity theft", for example, derives from the exploitation of certain critical elements of the personal information enumerated above. "Pretext" by information brokers and investigators is a legerdemain to ferret out these details against the interests of the consumer. It is also within these categories that each of us as individuals can feel the most apprehension about the uninformed use of that information (which in turn shows up in consumer responses to questions about privacy).

There is another aspect of information within the financial context that is not “personal-centric” at all. That is the collateral or “security-centric” aspect of financial transactions. Within the due diligence surrounding the collateral aspects of financial transactions, it is the collateral that is significant. The individual, personal consumer is only marginally relevant to this aspect of the transaction.

Whether the transaction is secured by securities, an automobile, a boat, a house, or even a deposit account, it is the collateral that matters, not the individual. What is the collateral? What are its attributes? Does the collateral have value, or at least adequate value to support the transaction? Is the state of the ownership/title such that the lender can use it as collateral? Is the collateral marketable?

In all these cases, the question is an objective one, looking to the physical, legal and market attributes of the collateral, regardless of who might be its owner or possessor.

Because of its different focus, information about collateral travels in different, more circumscribed circles. It is used to establish and in some cases stabilize the market for the collateral. (For example, consider the dissemination of publicly traded stock quotations) The more widely the information about collateral is disseminated, the more clearly its value is understood both by consumers and by lenders, and the more the potential for fraud and deception is minimized.

In the mortgage transaction, for example, the due diligence surrounding collateral is managed through several different providers, such as: the title abstracting and title insurance community, the real estate appraisal community, hazard insurance companies, flood and other national hazard information organizations. Each of these contributes to the knowledge and understanding of the collateral with little reference to the specific consumer.

Much of this due diligence is mandated by law and is conducted mostly with publicly available information. However, as in our case, the information in part is obtained by a common sharing of the objective aspects of the collateral involved in various mortgage transactions. That allows a common understanding of the physical attributes of properties and their likely sales prices. Within that context, we exercise substantial discretion about the nature of the information we collect and that which we

disseminate. Neither the borrower nor the lender is included in the information we make available as not relevant to the objective issue of understanding the collateral within its market.

Because the distinction between these two different types of information is not always well recognized or understood, there is a tendency to ignore the differences and unconsciously lump the collateral-centric information in with personal information in general.

Note that within the comments to the proposed regulation, the opposite question appears under the heading “o. Personally identifiable financial information”.

“The Agencies recognize that this interpretation may result in certain information being covered by the rules that may not be considered intrinsically financial, such as health status, and specifically invite comment on the proposed definition of ‘personally identifiable financial information’”.

At one end, some information is not intrinsically financial. Implicit within that is that at the other end, some information is not intrinsically personal. This is the case whether that information might otherwise fit under the category of “publicly available information” or not.

The proposed regulations do not clearly delineate what is and what is not personal information. They do not appear to discuss collateral information at all. Were they to include references to collateral information within the context of financial transactions, we would expect that substantially all, if not all of that information would fall outside of the scope of the regulations. In either case, it is our belief that this unexamined inclusion of collateral information under the rubric of personal information is not supported by the Congressional intent of Gramm-Leach-Bliley Act, nor its terms.

With this in mind, we would like to comment specifically on certain of the definitions, especially in those areas where the Agencies have invited comment.

Nonpublic Personal Information

Under the Act, “the term ‘nonpublic personal information’ means personally identifiable financial information” derived by the financial institution from one of three means. By exception, it does not include

“publicly available information”. It should be noted that not all information is accounted for. That is, not all information should be somehow included in the notion of personally identifiable financial information except publicly available information. Thus, while this create some uncertainty within the regulatory framework, it would seem important to recognize that not all information in the hands of a financial institution must of necessity be considered non-public personal information.

- **Alternative A and B. The Agencies have proposed two different alternative approaches to the issue the nature of publicly available information in the hands of the financial institution. Under Alternative A, a financial institution might consider the information in its hands as derived from publicly available information only if it has actually obtained the information from the public sources.**

Under Alternative B, a financial institution might consider the information in its hands as derived from publicly available information if is available from public sources, even if it has not actually obtained the information from the public sources (and in fact obtained it directly from the consumer).

The question is not addressed, but it would seem reasonable to assume that the financial institution itself need not physically obtain the information itself in any case. Thus, it should make not difference in the discussion whether the financial institution gathers the information or if, for example, a third party, such as a title examiner might gather information from land records, and then provide an abstract thereof to the financial institution. The actual issue is whether a consumer, by the act of providing information to the financial institution, can convert publicly available information into nonpublic personal information.

In our opinion, Alternative B is the only rational alternative. To the extent that information is publicly available, the consumer has no different expectation regarding the privacy of the information whether Alternative A or B is invoked. In fact, the notion that they might believe that they are able to bootstrap publicly available information into nonpublic personal information would seem to have the unintended effect of giving them a sense of privacy that simply does not exist. The information itself does not suddenly become nonpublic to the rest of the world, only in the context of one financial relationship.

Furthermore, to the extent that the financial institution is subject to greater expense in deriving the same information from both their consumers and the publicly available information, it imposes a greater burden on the financial institution with no greater protection for the consumer. Moreover, imagine the administrative headache that would arise in the event of a controversy about the source of the data, to no greater benefit regarding the protecting the public policy of privacy.

- **Information without personal identifiers.** The Agencies have specifically invited “comment on whether the definition of ‘nonpublic personal information’ would cover information about a consumer that contains no indicators of a consumer’s identity”. The comment includes an illustration of a circumstance regarding mortgage loans where the characteristics of those loans are made available to a third party for analysis without reference to the actual consumers associated with those loans.

The resolution to this issue in our opinion derives from the initial definition of “nonpublic information”. As nonpublic personal information is defined in the Act as “personally identifiable financial information” from various sources, it can only retain the status of nonpublic personal information if it is personally identifiable. Thus, if the borrower is stripped out of the information regarding the mortgage, then the nature of the information is no longer nonpublic personal information. In that case, none of the strictures regarding notice or opt out can apply. (Note that the Act §502 (a) NOTICE REQUIREMENTS rests on “nonpublic personal information”.) Again, this is consistent with the policy at issue. The explicit tie between the information and the individual consumer/customer is the nexus. In this case, that nexus is broken.

Note that there needs to be some limit to what is considered to be personally identifiable. Thus, taken to its logical limits, practically any detail about any transaction, certainly one concerning a mortgage can eventually be tracked back to the ultimate consumer/customer. For example, any item that identifies the geographic location of a property can eventually be returned back to the actual owner of a property, all through resort to the public record. Yet, in the illustration, that could be an important element in the market study under consideration. Again, it is just these kinds of “anonymous” studies that have the effect of driving down the cost of borrowing to consumers with little or no intrusion on their privacy.

Note for example that under n. Nonpublic personal information in the commentary regarding Alternatives A and B, it was made clear that even a person's name and address are publicly available information. Yet, it would be a reasonable expectation that the name would need to be redacted from any information provided by a financial institution to eliminate any inference that the information is personally identifiable. But what else? That would appear to be sufficient if any credence is to be given to the interplay of what is publicly available and what is nonpublic personal information.

Publicly Available Information

Setting aside the issue of Alternative A or B regarding publicly available information, there are three separate bases for establishing whether information is considered to be publicly available:

- Information from official public records**
- Information from widely distributed media**
- Information required to be disclosed to the general public by statute or regulation**

Further, it is indicated that “information obtained over the Internet will be considered publicly available information if the information is obtainable from a site available to the general public without requiring a password or similar restriction”.

Read together it is our view that publicly available information is information that is generally available to the public, either by virtue of governmental action (such as land records, assessment records, building permits, birth, marriage and death certificates, court filings and so on) or generally offered to the public for its consumption. The fact that individuals may or may not resort to any of those sources is not as important as that the information is generally available. Thus it would be unreasonable to expect a privacy interest in that information. In accord with the Act, this would be as opposed to such information as credit card transactions where there is a high expectation of privacy that is in turn being protected in the Act and these regulations.

It should be noted that while all of the enumerated sources are generally available to the public, few are free of charge. As a matter of course, while the review of official governmental records may be without charge (although not without inconvenience, especially as to location) copies of official governmental records are not free. In fact some records are quite expensive. The same might be said regarding “widely distributed media”, certainly newspapers and cable network stations.

This raises two significant issues: what is “widely distributed media” (and does it matter) and why are there inconsistent requirements required for information obtained from the Internet?

- **Widely distributed media.** The notion of widely distributed media needs to be read in the context of “nonpublic personal information”. That is, the more widely information might be available to the general public, the less nonpublic it can be. A person who lives in a small town of 500 inhabitants may be served by a newspaper that only covers that town. In that context, the newspaper is certainly widely distributed.

If the purpose of the phrase “widely distributed media” is intended to convey the implication that the media is sufficiently well distributed that it is not entirely obscure, then that fits the context. After all, at some point the media is insufficiently well distributed for it to be considered to be generally available and its contents are unlikely to be considered public. On the other hand, it is an unduly restrictive reading of publicly available if the publication or broadcast must be extremely popular, that is has a very large number of recipients or subscribers. Wide distribution in the right circles, even if those circles are specialized may be enough. A broader requirement would not appear to square with current expectations.

- **Internet sites.** The proposed regulation indicates that for any Internet site to be considered as providing publicly available information, it must be “available to the general public without requiring a password or similar restriction”. This limitation is not only overly restrictive but inconsistent with the other sources of publicly available information.

For example, the New York Times, certainly a widely distributed publication, is also available through the Internet, but for full access requires a username and password. These are available without charge, but subject the user to certain modest license restrictions. There are no

restrictions on who might become a user. That is, it is available to the general public.

Consumer Reports, a widely distributed publication, is also available through the Internet. It requires a username and password. Unlike the New York Times, it requires a modest subscription charge. Again, there are no restrictions on whom might become a user. It is also available to the general public.

In both cases, it would be disingenuous to argue that either one of these are not publicly available. In fact, both of these resources, in print form are not available without charge. Yet in that form, under any definition of widely distributed media, they would certainly qualify.

If these were official government records obtained only at some cost or through some password, they would also qualify as publicly available. There is no rational basis for making a distinction between the print, broadcast or other form and the Internet form.

The real distinction can only be made on whether the access is generally available to the public as opposed to an Internet site that is restricted in some meaningful way such that its content would not be considered publicly available.

Summary

In summary, we believe that a distinction needs to be made about different kinds of information. There is no "rebuttable presumption" that all information is somehow nonpublic personal information. In fact, there is just as likely a rebuttable presumption that most information is not nonpublic personal information, especially if redacted for customer identifiable specific information such as name, social security number and account number.

We started this comment with an attempt to delineate the categories that represent real areas of sensitivity. These are those that require the greatest vigilance and attention:

- **identifying information**, especially that information which “unlocks” the access to information about the individual consumer, such as the social security number and different account numbers;
- **credit information** especially about individual consumer’s credit usage, history and other characteristics;
- **financial information** such as income, assets, liabilities and “financial relationships” such as with whom the consumer has relationships and transactions
- **transactional information** including such as credit and debit card transactions (with whom and for what amounts), checking account payments and credits

As we indicated in our comments, other information that contributes to quality and reliability of financial services may not ripen to the level of nonpublic personal information and may not impinge on the privacy expectations and concerns that we all share. Trying to brighten the lines of demarcation at this time beyond that may be premature until we have some experience in the implementation of the regulations and the nature of the results that inure to the benefit of all of us as consumers.

Contact Information

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